No. 83-218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMOS REED, *et al.*,

Petitioners,

v.

DANIEL ROSS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Ross should be denied federal habeas corpus relief from his concededly unconstitutional and unreliable state conviction because he did not raise the constitutional issue on appeal, even though the reason that he did not do so was that the law establishing the constitutional principle had not yet begun to develop and was therefore effectively unavailable at the time of his appeal,* and even though the state courts had not refused on the procedural ground to decide the issue in Ross' cases or in the cases of other defendants who had also failed timely to raise the issue on appeal.

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*The State and the Solicitor General state the Question in terms of whether the constitutional issue was "novel" at the time of Ross' appeal. That shorthand reference is misleading, however. The issue was not even novel at that time. The foundation principle had not yet been decided, and no counsel or court had perceived or begun to litigate the issue.

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SUMMARY OF ARGUMENT

Although Ross was convicted at an unfair trial in which due process violations substantially impaired the truth-finding process, the State contends that his conviction should be upheld simply because he did not raise the issue on appeal, even though under state law the issue was adequately preserved at trial, even though he did appeal, even though the State Supreme Court did consider the burden of proof instructions on its own motion, even though the State Supreme Court has overlooked and the State has waived the failure to raise the issue on appeal in similar cases, even though the law establishing the violation had not yet begun to develop and the principle upon which it was based was not yet available or being urged, and even though Ross did raise the issue in the state courts as soon as this Court decided it and held that it applied retroactively. That contention is not supported by any federally cognizable policy or any legitimate state interest.

ARGUMENT

I.

ROSS COMMITTED NO PROCEDURAL DEFAULT IN THE STATE COURTS ADEQUATE TO JUSTIFY DENIAL OF FEDERAL HABEAS CORPUS.

In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), this Court held that federal habeas corpus review of a state conviction may be denied if the petitioner failed to comply with a state procedural rule at trial, see *Engle* v. *Isaac*, 456 U.S. 107, 110 (1982), if that failure constitutes an adequate and independent state ground on the basis of which the state courts denied relief.[1] 433 U.S. at 81. The first questions, therefore, are (a) whether the state had such a rule, (b) whether the rule was consistently enforced by imposing a forfeiture, and (c) whether the state courts invoked

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[1] Unless the petitioner shows "cause for and actual prejudice from the default." *Engle* v. *Isaac*, 456 U.S. 107, 110 (1982). See Argument II.

the procedural forfeiture in Ross' case. 433 U.S. at 85; see also, *Engle* v. *Isaac*, 456 U.S. at 125 n.27; *Jenkins* v. *Anderson*, 447 U.S. 231, 234-235 n.1 (1980); *Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980); C. Wright, LAW OF FEDERAL COURTS 343 (West 1983); L. Yackle, POSTCONVICTION REMEDIES 95-96 (1983 Cum. Supp.).

A. Ross Committed No Procedural Default At Trial

This case presents no issue of a failure to comply with a state contemporaneous objection rule. At the time of Ross' trial, North Carolina law did not require an objection to an erroneous instruction, including an erroneous instruction on the burden of proof. *State* v. *Johnson*, 227 N.C. 587, 589, 42 S.E.2d 685, 686 (1946); *State* v. *Gause*, 227 N.C. 26, 30, 40 S.E.2d 463, 466 (1946); see Brief for Pet. 8.

B. The North Carolina Supreme Court Decided The Burden Of Proof Issue On The Merits On Ross' Appeal

Ross appealed his conviction to the North Carolina Supreme Court. On that appeal, Ross challenged the instructions at his trial but not specifically on the burden of proof issue.

Rule 10 of the North Carolina Rules of Appellate Procedure then provided: "(T)he scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal . . . ." The North Carolina Supreme Court has, however, reviewed the correctness of instructions despite the failure of the defendant properly to make that issue the basis of an assignment of error in the record on appeal. *E.g.*, *State* v. *Freeman*, 295 N.C. 210, 244 S.E.2d 680, 689 (1978) ("Notwithstanding defendant's failure to comply with this rule, we have carefully examined the charge and we find it to be entirely adequate on proximate cause."); *State* v. *Riggsbee*, 285 N.C. 708, 208 S.E.2d 656, 662 (1974) ("Despite the failure of the defendant to set out what the court should have charged, we have carefully examined the entire charge."). Indeed, it did exactly that on Ross' appeal, holding: "The court charged fully and correctly on the burden

and intensity of the proof required to support each of the permissible verdicts of guilty. . . . While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable." *State* v. *Ross*, 275 N.C. 550, 554, 169 S.E.2d 875, 878 (1969).

"(I)f the state courts have entertained the federal constitutional claims on the merits in a subsequent proceeding, . . . the federal courts have no discretion to deny the applicant habeas relief to which he is otherwise entitled." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975). If the state courts are not concerned about a procedural default, "a federal court implies no disrespect for the State by entertaining the claim." *Ulster County Court* v. *Allen*, 442 U.S. 140, 154 (1979); *accord*, *Connecticut* v. *Johnson*, 103 S. Ct. 969, 974 n.8 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 135 n.44 (1982) ("If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review."); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Mullaney* v. *Wilbur*, 421 U.S. 684, 688 n.7 (1975); see also, *Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967); *Harlin* v. *Missouri*, 439 U.S. 459, 459 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974) ("But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice."); *NAACP* v. *Alabama*, 377 U.S. 288, 296-301 (1964); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Brown* v. *Allen*, 344 U.S. 443, 486 (1953); *Darr* v. *Burford*, 339 U.S. 200, 203 (1950); *Hawk* v. *Olson*, 326 U.S. 271, 278 (1945); *Herndon* v. *Lowry*, 301 U.S. 242, 247 (1937); *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936).

That doctrine applies to the present case. Because the State Supreme Court decided not to impose a procedural bar, the State may not insist on one in the federal courts. The critical

circumstance is that the state court considered the *issue*, *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976), even though it obviously did not consider the precise *argument* because *Mullaney* v. *Wilbur* had not yet been decided. The procedural failure cannot constitute an independent and adequate state ground for the state court's decision denying Ross relief; it was not a ground for the decision at all. See *Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980); *Hockenbury* v. *Sowders*, 620 F.2d 111, 115 (6th Cir. 1980).

C. The North Carolina Superior Court, And Probably The North Carolina Court Of Appeals As Well, Decided The Burden Of Proof Issue On The Merits On Ross' Post-Conviction Petition.

The State for the first time in this Court has claimed that the state courts "presumptively" denied Ross' post-conviction petition on the basis of his failure to raise the issue on appeal. Brief for Pet. 11, 21. The post-conviction trial court, however, expressly decided the petition on the merits, and the appellate court denied the petition without explanation.

Ross pursued his post-conviction petition without the assistance of counsel. Brief for Pet. A-3 to A-8. The trial court denied the petition on the merits on December 29, 1977, saying: "And the Court having considered the petition with the record in the case is of the opinion that it states no grounds for relief under the post-conviction review act." Brief for Pet. A-5. At that time, the only avenue for review of such a denial was a petition for discretionary review in the State Court of Appeals. When Ross sought such review, the State opposed his petition on the ground that he had not raised the issue on appeal. Brief for Pet. A-7. The State Court of Appeals denied certiorari on February 24, 1978 by a summary order, without explaining any basis for its action. Brief for Pet. A-8.

The State's request that the Court presume that the decisions were based on a procedural bar is contrary to the approach preferred by this Court in an analagous situation in *Michigan* v. *Long*, 103 S. Ct. 3469 (1983). In that case, the

Court said that when the decision of a state court "fairly appears to rest on federal law . . . and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3476. That approach is particularly appropriate here because the State Supreme Court had decided the issue on Ross' appeal, because—as discussed on pages 6-8—the state courts entertained this issue on the merits in other cases despite the same procedural default, because the post-conviction trial court did decide the merits, and because the State did not raise the procedural issue until the case was before the State Court of Appeals, when Ross was not represented by counsel and not given an opportunity to respond. *Ulster County Court* v. *Allen*, 442 U.S. 140, 149-154 (1979); see L. Yackle, POSTCONVICTION REMEDIES 98 (Cum. Supp. 1983). This is a question of state law, and this Court should not be asked to write state law where the state courts have not done so.

D. The North Carolina Courts Have Not Regularly Or Consistently Imposed A Forfeiture For Failure To Raise The Burden Of Proof Issue On Appeal Before *Mullaney* Was Decided.

This Court recently summarized: "Our decisions . . . stress that a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-263 (1982). See also, *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955) ("A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.")

(1) The cases in which the North Carolina courts have not imposed a forfeiture.

(a) *On appeal.* In *State* v. *Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds sub nom. Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), the North Carolina Supreme Court entertained the *Mullaney* issue on the merits on appeal despite the defendant's failure to raise it in his record on appeal, filed shortly before *Mullaney* was decided. Hankerson was convicted of murder in November, 1974, after instructions that violated the later decision in *Mullaney*. He appealed to the North Carolina Court of Appeals, but did not make any exception to the burden of proof instructions an assignment of error in the record on appeal. *Id.* That court affirmed the conviction without discussing the burden of proof issue, but with one judge dissenting on a different ground. *State* v. *Hankerson*, 26 N.C. App. 575, 217 S.E.2d 9, 12 (1975). That dissent entitled Hankerson to an appeal to the North Carolina Supreme Court. 220 S.E.2d at 578. This Court decided *Mullaney* on June 9, 1975. Hankerson filed his appeal in the North Carolina Supreme Court on July 31, 1975, still without raising the burden of proof issue. *Id.* On August 19, 1975, Hankerson moved to add the *Mullaney* issue to his appeal. *Id.* The North Carolina Supreme Court allowed that motion on September 2, 1975, one week before oral argument. Thus, the North Carolina Supreme Court sensibly entertained the *Mullaney* issue on the merits in Hankerson's appeal despite Hankerson's failure timely to raise it in the record on appeal.

(b) *On the former post-conviction procedure.* From 1951 until 1978 North Carolina post-conviction proceedings were governed by sections 15-217 through 15-222 of the North Carolina General Statutes. *State* v. *Bush*, 307 N.C. 152, 297 S.E.2d 563, 572 (1982); Note, 55 N.C. L. Rev. 653, 660 n.53 (1977). That covered the time of Ross' trial, his appeal, and his post-*Mullaney* petition for post-conviction relief. That law provided collateral review in the following circumstances:

> "Any person imprisoned . . . who asserts that in the proceedings which resulted in his conviction there was a

> substantial denial of his rights under the Constitution of the United States . . . may institute a proceeding under this Article."

N.C. Gen. Stat. § 15-217 (repealed 1977); see 55 N.C. L. Rev. at 660-661 n. 53.

The first decision interpreting that provision was *Miller* v. *State*, 237 N.C. 29, 74 S.E.2d 513 (1953), *cert. den.*, 345 U.S. 930 (1953). The court said the provision was

> "enacted to provide an adequate and available post-trial remedy for persons imprisoned under judicial decrees who suffered substantial and unadjudicated deprivations of their constitutional rights in the original criminal actions because they were prevented from claiming such constitutional rights in the original criminal actions by factors beyond their control."

74 S.E.2d at 528-529. The proceeding was designed to provide review, not of ordinary objections or evidentiary issues but "only in those instances in which a substantial denial of a constitutional right has been made to appear." *State* v. *Cruse*, 238 N.C. 53, 76 S.E.2d 320, 324 (1953). Even if the defendant did not appeal, he could file a post-conviction petition in order to have the state courts inquire into "whether there was a *substantial denial*" of his constitutional rights. *Branch* v. *State*, 269 N.C. 642, 153 S.E.2d 343, 346 (1967); *State* v. *Graves*, 251 N.C. 550, 112 S.E.2d 85, 89 (1960); *State* v. *Hackney*, 240 N.C. 230, 81 S.E.2d 778, 783 (1954).

In 1968, in *State* v. *White*, 274 N.C. 220, 162 S.E.2d 473 (1968), the North Carolina Supreme Court reaffirmed that

> "The Post-Conviction Act provides every defendant adequate opportunity for the adjudication of claimed deprivations of constitutional rights which prevented him from obtaining a fair trial, provided factors beyond his control prevented him from claiming them earlier."

162 S.E.2d at 479. Nevertheless, relying on *In re Sterling*, 63 Cal.2d 486, 47 Cal. Rptr. 205, 407 P.2d 5 (1965), which provided a state equivalent of *Stone* v. *Powell*, 428 U.S. 465 (1976), the Court refused post-conviction review on a search-and-seizure

issue, saying: "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." 162 S.E.2d at 480.

The North Carolina Supreme Court has granted relief on the *Mullaney* issue in at least one post-conviction petition despite the failure of the petitioner in that case to have included the issue in his record on appeal. *State* v. *Hancock*, in the Joint Appendix at 12.[2] Hancock raised the issue for the first time on his discretionary appeal to the North Carolina Supreme Court, after failing to comply with Rule 10 by raising it on his first appeal to the North Carolina Court of Appeals, and was denied relief. On his post-conviction petition on the same issue, however, the State Supreme Court granted Hancock a new trial.

(c) *On the current post-conviction procedure.* Effective July 1, 1978, but applicable "without regard to when a defendant's guilt was established or when judgment was entered against him," *State* v. *Bush*, 297 S.E.2d at 572, North Carolina replaced its Post-Conviction Hearing Act with a Motion For Appropriate Relief, N.C. Gen. Stat. §§ 15A-1411 through 15A-1422. See page 41. The North Carolina Supreme Court has reviewed on the merits on a Motion for Appropriate Relief at least one case raising the *Mullaney* issue. *State* v. *Bush*, *supra;* see Brief for Pet. 10 n.1. In that case, the defendant was convicted during the month before *Mullaney* was decided, but his appeal came after *Mullaney*, and he did not raise the issue. In reaching the issue on his motion for appropriate relief the Court did not even discuss the procedural failure. Thus, it would appear that Ross' failure to specify the burden of proof issue in his record on appeal would not preclude him from raising it under the Motion for Appropriate Relief proceeding.[3]

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[2] This decision was unpublished. Respondent is unaware whether there are other such decisions in this category.

[3] Having exhausted his state remedies by presenting this issue to the state courts under the Post-Conviction Hearing Act, if not on

(2) The cases in which the North Carolina courts have imposed a forfeiture.

In a series of identical brief orders shortly after this Court's decision in *Hankerson*, the North Carolina Supreme Court denied motions for reconsideration filed by defendants whose cases had already been decided on appeal, and who were seeking for the first time to raise the *Mullaney* issue. *State* v. *Riddick*, 293 N.C. 261, 247 S.E.2d 234 (1977); *State* v. *May*, 293 N.C. 261, 247 S.E.2d 234 (1977); *State* v. *Jackson*, 293 N.C. 260, 247 S.E.2d 234 (1977); *State* v. *Crowder*, 293 N.C. 259, 243 S.E.2d 143 (1977); *State* v. *Brower*, 293 N.C. 259, 243 S.E.2d 143 (1977). In each case, the Court explained its rationale as follows:

> "Inasmuch as defendant did not assign as error on appeal . . . he was waived his right now to complain about such errors. *Hankerson* v. *North Carolina*, 432 U.S. 233, 244, n.8 (1977)."

The noteworthy aspect of those decisions is that they cited no North Carolina authority. Instead, they cited only the dictum in footnote 8 of this Court's decision in *Hankerson:* "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson* v. *North Carolina*, 432 U.S. at 244 n.8. That footnote did not, however, purport to establish a federal rule of forfeiture for state courts. Presumably, it referred to the *Wainwright* v. *Sykes* adequate and independent state ground doctrine, which would honor any state-law based forfeiture subject to the cause-and-prejudice exception. The forfeiture must be provided by state law, however, see *Rezin* v. *Wolff*, 439 U.S. 1103 (1979) (White, J., dissenting from denial of certiorari), and the North Carolina Supreme Court invoked no state law in support

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appeal, Ross is not required to present it to them again under the new Motion for Appropriate Relief procedure before being able to pursue it on federal habeas corpus. *Francisco* v. *Gathright*, 419 U.S. 59, 62 (1974); *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971).

of its rulings. No North Carolina court did so until the North Carolina Court of Appeals issued its published opinion on June 6, 1978 in *State* v. *Abernathy*, 36 N.C. App. 527, 244 S.E.2d 696 (1978), three and one-half months after it summarily rejected Ross' post-conviction petition.

(3) These cases confirm that the North Carolina courts decided Ross' post-conviction petition on the merits and that the North Carolina courts have not regularly imposed a procedural forfeiture on this issue.

Hankerson, *Hancock* and *Bush* demonstrate that Rule 10 is not regularly enforced by a forfeiture. Moreover, in *Wynn* v. *Mahoney*, 600 F.2d 448 (4th Cir.), *cert. den.*, 444 U.S. 950 (1979), North Carolina waived the procedural bar that it now chooses to assert. As the Fourth Circuit noted in that case: "We have no occasion to decide the *Wainwright* question since North Carolina explicitly waived that point in oral argument of this appeal." *Id.* at 450 n.1.

The State has attempted to distinguish *Hankerson* and *Hancock* on the ground that those defendants raised the issue while their cases were still pending on appeal, although not in timely fashion. Brief for Pet. 12. That explanation takes no account of *Bush* or of the State's waiver of the procedural bar in *Wynn* v. *Mahoney*. Moreover, it overlooks the fact that both the North Carolina appellate rules and the *Hankerson* principle of retroactive application of *Mullaney* accord no significance to raising an issue in the twilight of the appeal stage rather than the dawning of a post-conviction challenge. Rule 10 required the issue to be "made the basis of assignments of error in the record on appeal." The North Carolina Supreme Court did not enforce that rule by a forfeiture in *Hankerson*, *Hancock* or *Bush*. There is no equitable basis for imposing against Ross a procedural bar that was expressly not applied against Hankerson, Hancock, Bush or Wynn when they were similarly situated. Moreover, this Court held that *Mullaney* is fully retroactive, not just to cases still pending on appeal. *Cf.*, *United States* v. *Johnson*, 457 U.S. 537, 562, 562 n.21 (1982).

II.

THE COURT OF APPEALS CORRECTLY HELD THAT, CONSIDERING ALL THE CIRCUMSTANCES, ROSS DEMONSTRATED CAUSE FOR HIS FAILURE TO CHALLENGE THE BURDEN OF PROOF INSTRUCTIONS ON HIS PRE-*WINSHIP* APPEAL SO THAT HE WAS ENTITLED TO FEDERAL HABEAS CORPUS RELIEF FROM HIS CONSTITUTIONALLY UNRELIABLE CONVICTION.

A state petitioner may obtain federal habeas corpus relief despite a procedural default if he shows "cause for and actual prejudice from the default." *Engle* v. *Isaac*, 456 U.S. at 110; *Wainwright* v. *Sykes*, 433 U.S. at 87, 90-91. The "cause" prong of that standard may be satisfied by a single circumstance such as, in this case, that the constitutional principle developed only after the time that the petitioner was required to raise the issue. The "cause" analysis may also take account of all the circumstances in the case. The Court of Appeals employed that approach in this case.

A. The Constitutional Violation Substantially Impaired The Truth-Finding Process At Ross' Trial.

The trial court's instructions imposing on Ross rather than the prosecution the burden of persuasion on the issues of malice and self-defense denied Ross due process of law. *Mullaney* v. *Wilbur, supra; State* v. *Hankerson*, 220 S.E.2d at 584; see also, *Engle* v. *Isaac*, 456 U.S. at 122. In *Hankerson* v. *North Carolina*, this Court said that the constitutional prohibition against shifting this burden of proof to the defendant "was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.' " 432 U.S. at 242. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). "[T]he reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error.' " *Ivan V.* v.

New York, 407 U.S. 203, 204 (1972). The constitutionally erroneous instruction by the trial court " 'raises *serious* questions about the accuracy' " of the jury's verdict. *Hankerson* v. *North Carolina*, 432 U.S. at 243.

In *Engle*, this Court held that *Sykes* applies to issues relating to the truthfinding function. 456 U.S. at 129. Nevertheless, the Court added that "the nature of a constitutional claim may affect the calculation of cause and actual prejudice." *Id.*; see also, *Rushen* v. *Spain*, 104 S. Ct. 453, 458-459 (1983) (Stevens, J., concurring); *Rose* v. *Lundy*, 455 U.S. 509, 544, 546-547, 548 n.17 (1982) (Stevens, J., dissenting); *Wainwright* v. *Sykes*, *supra* at 96 (Stevens, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 479 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 257-258 (1973) (Powell, J., with Burger, C. J. and Rehnquist, J., concurring); *Kaufman* v. *United States*, 394 U.S. 217, 234, 235-236 (1969) (Black, J., dissenting); *Price* v. *Johnston*, 334 U.S. 266, 291 (1948). In *Wainwright* v. *Sykes*, the Court expressed confidence that this procedural obstacle will not prevent the federal courts from using habeas corpus to protect a defendant who would otherwise be "the victim of a miscarriage of justice." 433 U.S. at 91. In *Engle*, the Court agreed "that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." 456 U.S. at 135. The State has conceded that Ross suffered prejudice at his trial from the constitutional violation. See Brief for Pet. 17; Brief for United States 4.

B. The Unavailability Of A Constitutional Claim Because The Precedential Tools For Constructing It Had Not Yet Begun To Develop Constitutes "Cause" For The Failure Timely To Raise The Claim.

Counsel plays an important role in the adversary system. Proper functioning of that system requires committing the conduct of the defense to counsel in consultation with the defendant. See *Jones* v. *Barnes*, 103 S.Ct. 3308, 3313 and n.6 (1983); *Wainwright* v. *Sykes*, *supra* at 92, 93-94 (Burger, C. J., concurring); *id.* at 98 (White, J., concurring). Institutional

necessities mean that defendants are often bound by the actions and judgments of their attorneys. Litigation cannot be replayed to test alternative strategies. Thus, tactical decisions by defense counsel cannot be "cause" for the failure to pursue a different course. *Gardner* v. *Florida*, 430 U.S. 349, 361 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 514-515 (1976); *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972); *Sunal* v. *Large*, 322 U.S. 174, 181 (1947). That standard situation, where counsel makes decisions that are committed to his or her responsibility, occupies the expansive middle ground in the spectrum of procedural failures diagrammed in Exhibit A. At one extreme are cases in which the attorney acts or fails to act as a result of (i) incompetence, (ii) gross negligence, or (iii) inadvertence, negligence, or lack of due diligence. The quality of the criminal defense bar has not yet reached the stage where the courts can totally ignore the hardships of defendants who stand to lose important constitutional rights as a result of the ineffective assistance of counsel. See generally, *Carrier* v. *Hutto*, ___ F.2d ___ (4th Cir. 1983). That is not the issue in this case, however.

The problem in this case arises at the other end of the spectrum: Ross failed to raise the constitutional issue because it was not yet available; not even the precedential tools to construct it had yet been developed. He and his attorney made no judgment about the issue; they were understandably unaware that there was an issue to decide about. The State makes no claim that they gave it any thought or that they entertained any strategic or tactical considerations. In this situation, counsel is not a meaningful safeguard. Therefore, the unconstitutionally severe hardship to Ross cannot be overlooked simply because he had counsel.

The Solicitor General argues that the contemporary unavailability of a later decision establishing a new constitutional principle that is retroactively applicable should never constitute "cause." Brief for United States 17. That position ignores the unanimous support for this basis for "cause" in several decisions of this Court, the opinions of other courts,

considerable scholarly commentary, analogous provisions of the Federal Rules, and even the Administration's legislative proposals that have recently passed in the Senate.

(1) *The decisions of this Court.* In *Engle*, this Court suggested that a change in the law might constitute "cause" for the failure of a criminal defendant to raise the claim before the law had developed "the tools to construct their constitutional claim." 456 U.S. at 133. The Court did not decide that question, however, because it found that "respondents' claims were far from unknown at the time of their trials." 456 U.S. at 131. In *Wainwright* v. *Sykes*, Justice White, in a concurring opinion, wrote that "ignorance of the applicable rules . . . would be sufficient to excuse the failure to object to evidence offered during trial." 433 U.S. at 99; see also, *id.* at 98 ("if counsel is aware of the facts and the law"). The circumstance that the applicable law had not yet begun to develop is the most reasonable explanation for counsel to be unaware of it.

Several decisions of this Court have recognized that it would be improper to deny a retroactive new constitutional decision to a litigant because of failure to assert it before it was reasonably available. Those pronouncements were not made pursuant to the cause-and-prejudice test. Their perception of the equities in the treatment of a retroactive change in the law, however, is equally applicable today.

The most recent instructive statement by this Court came in *O'Connor* v. *Ohio*, 385 U.S. 92 (1966). See *Anders* v. *California*, 386 U.S. 738, 743 (1967). The defendant contended that the prosecutor's comment upon his failure to testify violated *Griffin* v. *California*, 380 U.S. 609 (1965), which was decided after he had exhausted his state appeals without raising the issue. The Court unanimously held "that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. . . . Defendants can no more be charged with anticipating the *Griffin* decision than can the States. . . . Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to

attack the practice following its invalidation by this Court." 385 U.S. at 93; see *United States* v. *Johnson*, 457 U.S. 537, 543 (1982).

In *Smith* v. *Yeager*, 393 U.S. 122 (1968), the defendant, convicted of murder in state court, sought federal habeas corpus on the basis of an allegedly involuntary confession before this Court's decision in *Townsend* v. *Sain*, 372 U.S. 293 (1963). At that time the law provided an evidentiary hearing only in " 'unusual circumstances'," and it was doubtful that the defendant could have got one. 393 U.S. at 125. His attorney told the District Court that he did not need one, and the District Court found that his confession was not involuntary. After *Townsend*, the defendant again sought federal habeas corpus on the same ground. This time he requested an evidentiary hearing, alleging new facts making a stronger case for coercion in connection with his confession. The District Court denied that request on the basis of his first petition. This Court reversed, explaining that it could not find that the defendant "intentionally relinquished a known right or privilege . . . when the right or privilege was of doubtful existence at the time. . . ." 393 U.S. at 126.

In *Davis* v. *United States*, 417 U.S. 333 (1974), this Court upheld "the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law." *Id.* at 334. *Davis* involved a conviction for draft evasion. The defense was one that this Court later recognized in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), but the Court of Appeals denied the defendant relief on the basis that his case did not come within *Gutknecht*. Thereafter, the Court of Appeals decided another case in a contrary manner, but refused to give the defendant the benefit of that change in circuit law when he brought a petition under 28 U.S.C. section 2255. This Court reversed, holding that the defendant was entitled to base his claim for collateral relief on "an intervening change in law." *Id.* at 342; see also, *id.* at 347 (Powell, J., concurring and dissenting) (section 2255 is available "due to the intervening change in the law of the Circuit").

Davis may be compared with an earlier draft evasion case, *Sunal* v. *Large*, 332 U.S. 174 (1947). In *Sunal*, the defendants raised a defense that this Court upheld after their trial in *Estep* v. *United States*, 327 U.S. 114 (1946). Defendants were represented by the same attorneys who were handling the *Estep* case in the appellate process at the time, but they did not appeal. When they later sought to attack their convictions collaterally, this Court denied them relief. The Court first speculated that the defendants' failure to appeal may have been a deliberate litigation tactic: "Why the legal strategy counseled taking appeals in the . . . *Estep* cases and not in these we do not know. Perhaps it was based on the facts of these two cases." 332 U.S. at 181. The Court proceeded to deny relief on a rationale similar to that in *Engle*, explaining: "The case, therefore, is not one where the law was changed after the time for appeal had expired. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." *Id.* Thus, the Court implied that it would excuse a default "where the law was changed after the time for appeal had expired," but it said that not only was the basis for the new law already available, but the defendants' attorneys were presenting the claim at that very time in other cases. The Court emphasized that the defendants were not claiming that they had suffered a violation of due process and that the error did not "trench on any constitutional rights of defendants." 332 U.S. at 182. In *Davis*, the Court said that *Sunal* "recognized that this rule would not bar the assertion of *constitutional* claims in collateral proceedings even if the applicant had failed to pursue them on appeal." 417 U.S. at 345 n.15.[4]

An analagous situation was presented in *Reece* v. *Georgia*, 350 U.S. 85 (1955). In that case, the defendant tried to chal-

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[4]Justice Frankfurter dissented in *Sunal*, saying that he would have allowed habeas corpus because these were exceptional circumstances. Justices Rutledge and Murphy also dissented, saying that the change in law established a good reason for defendants' failure to appeal.

lenge the grand jury that indicted him. State law required such a challenge to be made before indictment, but the defendant did not have counsel appointed to represent him until the day after his indictment.[5] This Court therefore agreed to entertain the issue on the merits on direct review: the obligation to comply with the state rule, the Court reasoned, "presupposes an opportunity to exercise that right." 350 U.S. at 89; *accord*, *Carter* v. *Texas*, 177 U.S. 442 (1900).

Thus, the Court has regularly recognized that a change in the law is an adequate excuse for failing to raise an issue before the change became effectively available. See also, *Estelle* v. *Williams*, 425 U.S. 501, 515 (1976) (we need not allow "counsel for a defendant deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection . . . ."); *Johnson* v. *Bennett*, 393 U.S. 253, 255 (1968) (discussed at page 27); *Sanders* v. *United States*, 373 U.S. 1, 17 (1962) ("If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law . . . ."); *Brown* v. *Allen*, 344 U.S. 443, 486 (1953) ("failure to raise a known and existing question of unconstitutional proceeding."). *Price* v. *Johnston*, 334 U.S. at 291 ("The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief"); *New York Central R. Co.* v. *New York and Pa. Co.*, 271 U.S. 124, 127 (1926); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) ("(T)he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); see also, *Staub* v. *City of Baxley*, 355 U.S. 313, 318-319 (1958). Over the years no Justice has expressed a contrary view. In *Engle*, the

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[5] Ross' handicap was similar: he did not have available the legal principle that made his right to counsel meaningful until the day for him to raise the issue on appeal had passed.

Court seemed to agree with this position. Referring to footnote 8 in *Hankerson*, the Court said: "In these cases we accept the force of that language as applied to defendants tried after *Winship*." 456 U.S. at 134 n.43.

(2) *The decisions of other courts and law review comments.* Other courts[6] and commentators[7] have reached a unanimous consensus that a retroactive change in the law is a paradigm example of "cause" for failure to raise an issue in accordance with a state procedural rule. Neither the State nor the Solicitor General has referred to a single authority to the contrary.

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[6] Third Circuit: *Boyer* v. *Patton*, 579 F.2d 284, 288 (3d Cir. 1978); see also, *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 443, 444 (3d Cir. 1982); Fourth Circuit: *Ross* v. *Reed*, 704 F.2d 705, 708-709 (4th Cir. 1983) (the decision below); *Ledbetter* v. *Warden*, 368 F.2d 490, 494 (4th Cir. 1966) (*en banc*); see also, *Bramwell* v. *Williams*, 445 F. Supp. 106, 114 (D. Md. 1977); Fifth Circuit: *Preston* v. *Maggio*, 705 F.2d 113, 117 (5th Cir. 1983); Sixth Circuit: *Canary* v. *Bland*, 583 F.2d 887, 890 (6th Cir. 1978); see also, *id.* at 894 (Merritt, Cir. J., concurring) ("He has shown 'cause' in that the applicable opinions upon which he relies had not been decided nor could reasonably have been anticipated at the time . . . .") Seventh Circuit: *Norris* v. *United States*, 687 F.2d 899, 903 (7th Cir. 1982) (dictum) ("In some cases there may be a good reason for this weird procedure [failing to raise an issue on appeal]—such as incompetency of counsel in the first appeal, newly discovered evidence, or an intervening change in the law—and if so the appellant will be able to demonstrate good cause for his failure. . . ."); Eighth Circuit: *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), *cert. den.*, 439 U.S. 1133 (1979); see also, *Dietz* v. *Solem*, 677 F.2d 672, 675 (8th Cir. 1982); Ninth Circuit: *Gibson* v. *Spalding*, 665 F.2d 863, 866 (9th Cir. 1981), *vacated for reconsideration in light of Engle*, 456 U.S. 962 (1982), *on remand*, 703 F.2d 363 (9th Cir. 1983); *Myers* v. *Washington*, 646 F.2d 355, 359, 360 (9th Cir. 1981) *vacated for reconsideration in light of Engle*, 456 U.S. 921 (1982), *on remand*, 702 F.2d 766 (9th Cir. 1983) (None of the *Sykes* considerations "has any force in dealing with a situation . . . where the alleged procedural default consists of failure to raise on appeal constitutional issues that were unknown at the time the appeal was taken."); Eleventh Circuit: *Sullivan* v. *Wainwright*,

(3) *The Federal Rules.* Rule 9(a) of the Federal Rules of Habeas Corpus presents a comparable situation. Rule 9(a) provides:

> "A petition may be dismissed if it appears that the state has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is

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695 F.2d 1306, 1308-1311 (11th Cir. 1983); see also, *Ford* v. *Strickland*, 696 F.2d 804, 817 (11th Cir. 1983) *(en banc)*; *id.* at 883 n.9 (concurring and dissenting opinion); West Virginia: *Jones* v. *Warden*, 241 S.E.2d 914, 916 (W. Va. 1978) ("Safeguarding the integrity of the factfinding process must take priority over procedural concerns such as whether a trial lawyer could perceive future United States Supreme Court rulings and object to acts or instructions on the basis of constitutional infirmities yet unborn.").

[7] *E.g.*, Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 460 (1963) (recommending a limitation "placing on the prisoner the obligation to make his allegations within a reasonable time after they have become available to him."); Friendly, "Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments," 38 U. Chi. L. Rev. 142, 153 (1970) ("New constitutional developments relating to criminal procedure are another special case.") Goodman and Sallet, "Wainwright v. Sykes: The Lower Federal Courts Respond," 30 Hastings L.J. 1683, 1712 (1970); Hart, "Foreword: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 112 n.81 (1959) ("excusable ignorance of facts or law"); Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1078 n.160 (1978) ("The decision of the Court to make its new rule retroactive would be reduced to a mockery if the right of the prisoner depended on foresight of counsel in anticipating the new constitutional development."); Tague, "Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do," 31 Stan. L. Rev. 1, 25 (1978); Westen, "Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure," 75 Mich. L. Rev. 1214, 1245 (1977) ("(I)f a newly recognized defense is constitutionally retroactive, a defendant who was convicted in the past is constitutionally entitled to raise the claim now as a defense to his conviction.")

> based on grounds of which he could not have been aware by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

The Advisory Committee Note to that Rule, 28 U.S.C.A. foll. § 2254 at 1138, specifies: "The Petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law . . . ."

Rule 9(b) provides for the dismissal of successive petitions if there is an "abuse of the writ." Here again the Advisory Committee Note, 28 U.S.C.A. foll. § 2254, at 1139, specifies: "There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples."[8]

(4) *Reagan Administration proposals in Congress to define "cause."* The United States Senate on February 6, 1984 by a vote of 67-9 passed the Reform of Federal Intervention in State Proceedings Act, S. 1763, 98th Cong. That bill defines "cause" in three circumstances. One of those circumstances is if "the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable." That bill was sponsored by the Administration. Thus, the Administration's legislative program

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[8] The courts have frequently used a change in the law to excuse delayed or successive petitions. See *Alexander* v. *Maryland*, 719 F.2d 1241, 1246 (4th Cir. 1983); *Garland* v. *Cox*, 472 F.2d 875, 877 (4th Cir.), *cert. den. sub nom. Slayton* v. *Garland*, 414 U.S. 908 (1973); *Marks* v. *Estelle*, 691 F.2d 730, 733, 735 (5th Cir. 1982) ("In effect, the state argues that Marks should have brought *Argersinger* before *Argersinger* was brought—that he was bound to assert a constitutional right he did not have. This would require a degree of diligence much higher than reasonable. . . . It would be palpably unfair to require a habeas petitioner to assert a constitutional right before that right exists."); *McDonnell* v. *Estelle*, 666 F.2d 246, 253 (5th Cir. 1982). See *Antone* v. *Dugger*, 104 S.Ct. 962, 965 (1984).

and the Senate's action are contrary to the Solicitor General's position.[9]

C. The Reason For Ross' Failure To Raise The Issue On Appeal Was That His Appeal Had Been Decided By The Time *Winship* Laid The Basis For His Constitutional Claim And Before Any Lawyers, Courts Or Commentators Had Perceived Or Litigated The Issue.

(1) *The test for a change in the law.* The reasons for recognizing a change in the law in the calculation of "cause" are equitable and institutional. The equitable reason is the unfairness of depriving a defendant of a newly declared principle of due process that applies retroactively to his trial solely because he did not preserve the issue at a time before it was reasonable to expect him to be aware of the issue. Sustaining his unconstitutional conviction for conduct that it was not reasonably possible for him to avoid would have the appearance of a penalty[10] that would be "disproportionate to the magnitude of the offense against the state's procedural system."[11]

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[9] An earlier version of the Administration proposal, S. 2216, 97th Cong., defined "cause" to exist where "the Federal right asserted was not recognized prior to the procedural default." Another Administration bill introduced during the same Congress, S. 2903, 97th Cong., contained a definition of "cause" in the identical language of the bill passed by the Senate on February 6. Analogous bills introduced into the House would make the same provision. H.R. 3416, 97th Cong.; H.R. 6050, 97th Cong.; H.R. 7117, 97th Cong.; H.R. 50, 98th Cong.

[10] See Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1064 (1978); Rosenberg, "Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel," 62 Minn. L. Rev. 341, 414 (1978); Tague, "Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do," 31 Stan. L. Rev. 1, 42 (1978); Comment, 130 U. Pa. L. Rev. 981, 984 (1982); "The Supreme Court, 1981 Term," 96 Harv. L. Rev. 1, 226 (1982).

[11] Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1071 (1978).

The institutional reason was described in *Engle:* "We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." 456 U.S. at 131; see *Ross* v. *Reed*, 704 F.2d at 708; see also, *Jones* v. *Barnes*, 103 S.Ct. at 3312-3313; *Myers* v. *Washington*, 646 F.2d 355, 360 (9th Cir. 1981), *vacated*, 456 U.S. 921 (1982), *on remand*, 702 F.2d 766 (9th Cir. 1983). The problem is even more acute for appeals. Trials accomodate a multitude of objections of varying degrees of import that would clutter an appeal. Appellate counsel should screen out frivolous issues. An automatic forfeiture rule, however, would deprive counsel of the flexibility to make judgments about the relative likelihood of success of issues in light of the reasonably available or developing law at the time.[12]

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[12] Conscientious counsel already are reacting to the extension by some Courts of Appeals of *Wainwright* v. *Sykes* to appeals by trying to preserve all conceivable issues. See, *e.g.*, *State* v. *Brown*, 306 N.C. 151, 293 S.E.2d 569, 583 (1982) ("Counsel acknowledges that many of these issues have been previously addressed and candidly concedes that he would have to 'overcome substantial precedent' in order to prevail. Without unduly burdening this Court with extended argument defendant requests that we review these issues and reconsider our prior holdings."); *State* v. *Sparks*, 297 N.C. 314, 255 S.E.2d 373, 376 (1979) ("Defendant has sought to bring forward over 200 exceptions . . . .")

Even such efforts by defense counsel will not raise unforeseen constitutional doctrines that receive subsequent development unless they also exercise "extraordinary vision." *Engle* v. *Isaac*, 456 U.S. at 131.

The North Carolina Supreme Court has already expressed resentment over this practice which appears necessary unless the *Wainwright* "cause" standard allows counsel to select the most promising issues for review, see *Jones* v. *Barnes*, 103 S.Ct. at 3313, without risking the automatic forfeiture of others that future decisions might enhance. For example, in *State* v. *Warren*, ___ N.C. ___, 306

These two reasons inform the formulation of the test for what constitutes a change in the law. The question should be whether the state of the law at the time was such that counsel's unawareness of the issue was "excusable." *Engle* v. *Isaac*, 456 U.S. at 130 n.35; *Wainwright* v. *Sykes*, 433 U.S. at 89 n.13; *Estelle* v. *Williams*, 425 U.S. at 513 (Powell, J., concurring); Hart, *Foreward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 118 (1959), or a "justifiable reason." *Price* v. *Johnston*, 334 U.S. at 291. Thus, *Engle* held that the standard was not met where the claim was "far from unknown," 456 U.S. at 131, and where "other defense counsel have perceived and litigated that claim." 456 U.S. at 134; *cf.*, *Estelle* v. *Williams*, 425 U.S. at 511-512 n.8. The Solicitor General agrees that "(t)he only certain standard would be to say that a claim is no longer novel once it has been 'perceived and litigated' . . . in any reported case." Brief for the United States 25.

An appropriate analogy is the test for whether a decision announced a "new rule" for the purpose of the retroactivity-

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S.E.2d 446, 448 (1983), that Court said: "Defendant challenges the process of death qualifying the jury and assigns as error the trial court's denial of his motion for a separate trial jury and a separate sentencing jury. This Court has consistently rejected defendant's contentions." 306 S.E.2d at 448. Then, quoting from *Jones* v. *Barnes*, the Court criticized counsel for raising the issue after the Court had rejected it in earlier cases. 306 S.E.2d at 448. The issue that the Court criticized counsel for raising is an important one that holds promise of ultimately deserving the attention of this Court, however, and has since that decision won favor in *Avery* v. *Hamilton*, ___ F. Supp. ___ (W.D. N.C. 1984) and *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), appeal pending, No. 83-2113. See also, *State* v. *Jackson*, 309 N.C. 26, 305 S.E.2d 703, 708 n.1 (1983); *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, 212 (1982) ("Defendant brings forward many assignments of error . . . . At the outset, we must note that defendant's appellate counsel filed a brief which is 109 pages long. A defendant who stands convicted in a capital case is, of course, entitled to effective and diligent advocacy in the presentation of his appeal. However, defendant's brief seems unduly lengthy and quite repetitious.").

prospectivity question. That determination serves parallel purposes of protecting equitable (the reliance factor) and institutional concerns on the part of the states. In *United States* v. *Johnson*, this Court recently summarized the three categories of "new rules" for this purpose: (i) "(A) decision explicitly overrules a past precedent of this Court." 457 U.S. at 551; see also, *id.* at 550 n.12. (ii) A decision "disapproves a practice this Court arguably has sanctioned in prior cases." *Id.* at 551. (iii) A decision "overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.*; see also, *id.* at 550 n.12 (" 'or by deciding an issue of first impression whose resolution was not clearly foreshadowed' ").

(2) *Engle did not meet the test for a change in the law.* The respondents in *Engle* were convicted in separate trials in January, April and September, 1975. As this Court found, there was a substantial legal foundation in existence by that time that should have alerted them to the issue. That foundation consisted of the following:

(i) The principal component was *In re Winship*, 397 U.S. 358 (1970). As the Court said in *Engle*: "*In re Winship* . . . laid the basis for their constitutional claim." 456 U.S. at 131. *Winship* was decided more than four years before the trials in that case.

(ii) Between the time of the decision in *Winship* and the respondents' trials "dozens of defendants relied upon this language [in *Winship*] to challenge the constituionality of rules requirng them to bear a burden of proof." 456 U.S. at 131-132. Those cases involved the burden of proof not only with regard to elements of the offense charged such as the mental element for the crime (*e.g.*, lack of intent to return a stolen item) and the identify of the defendant as the perpetrator (alibi), but also a range of affirmative defenses including insanity, entrapment, license or authorization to sell drugs, inducement, lack of malice, and, most importantly, the issue involved in all three cases in *Engle*, self-defense. 456 U.S. at 132 n.40.

(iii) "(N)umerous courts agreed that the Due Process Clause required the prosecution to bear the burden of disproving certain affirmative defenses." 456 U.S. at 133. Indeed, *Mullaney* had already been decided at the District Court and Court of Appeals levels and was pending before this Court. The trial in one of the three cases in *Engle* actually took place three months after this Court's decision in *Mullaney*.

(iv) "Several commentators also perceived that *Winship* might alter traditional burdens of proof for affirmative defenses." 456 U.S. at 133 n. 40. These materials were published between 1970 and 1974.

(v) Ohio had adopted a new criminal code that put the burden of persuasion for affirmative defenses on the prosecution. 456 U.S. at 111.

(3) *This case does meet the test for a change in the law.* At the time of Ross' appeal, none of that material existed. See Exhibit B. *Winship* "laid the basis," 456 U.S. at 131, for Ross' constitutional claim only after he had concluded his appeal.

(i) Although until *Winship* and *Mullaney*, it had "long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required," *Winship*, 397 U.S. at 362, it had also been "the long accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson* v. *New York*, 432 U.S. 197, 211 (1977). In *Leland* v. *Oregon*, 343 U.S. 790, 797 (1952), the Court had upheld a state procedure putting on the defendant the burden of proving his insanity defense beyond a reasonable doubt. That decision was the prevailing constitutional law regarding the allocation of the burden of proof on affirmatve defenses until *Winship* began to cast doubt on it. See *State* v. *Wilbur*, 278 A.2d 139, 146 (Me. 1971).

Winship "held *for the first time* that the Due Process Caluse of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged.' " *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979) (emphasis added); see also, *id.* at 317-318 ("*Winship* . . . established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process".). The constitutional character of the standard of proof beyond a reasonable doubt was "announced in *Winship*." *Ivan V.* v. *New York*, 407 U.S. 203, 205 (1972); see also, *Cool* v. *United States*, 409 U.S. 100, 104 (1972). In *Patterson*, the Court described the process of decision: "In 1970, the Court declared that the Due Process Clause 'protects the accused against conviction except upon proof beyond a reasonable doubt. . . . *In re Winship*. . . . Five years later, in *Mullaney* v. *Wilbur*, . . . the court further announced . . . ." 432 U.S. at 204-205.

In *Mullaney*, the Court stated the issue as whether Maine law "comports with the due process requirement, as defined in *In re Winship*." 421 U.S. at 685. In its discussion, the Court based its decision on *Winship*. 421 U.S. at 698-701. Justice Rehnquist, joined by Chief Justice Burger, agreed in a concurring opinion that *Winship* required the Court's result. 421 U.S. at 705.

In *Engle*, this Court noted that even before *Winship* one federal court of appeals and one state court had decided that the constitution requires the prosecution in a criminal case to bear the burden of proof on the elements of the crime. The federal case, *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir.) *(en banc), cert. den.*, 393 U.S. 1001 (1968), involved an alibi. The court based its decision on the obvious point that alibi is not an affirmative defense but is simply a special term for a form of defense evidence contradicting the prosecution's proof of an essential element of the offense as charged, that the defendant was at the scene of the crime. By imposing the burden of proof on that issue on the defendant, the court recognized, the State effectively required the defendant to prove that he was not the perpetrator of the offense. Reasoning that this was different from putting the burden of proof on the defendant for a true affirmative defense, and distinguishing *Leland* v. *Oregon* on that basis, 398 F.2d at 119, the court held it was unconstitutional.

The same court, however, then rejected a similar challenge from a defendant who had been convicted in 1934 in a trial with the same instruction on the alibi burden of proof, and had not then objected to the instruction, holding that its new decision should not be given retroactive application. *Johnson* v. *Bennett*, 386 F.2d 677, 683 (8th Cir. 1967). This Court vacated that decision and remanded the case for reconsideration in light of *Stump*. *Johnson* v. *Bennett*, 393 U.S. 253, 255 (1968).

The state decision was *State* v. *Nales*, 28 Conn. Sup. 28, 248 A.2d 242 (1968). That case relied on *Stump* in holding unconstitutional a statute putting the burden on a defendant charged with possession of burglary tools to prove that he had a lawful excuse for having his tools—that is, requring the defendant to disprove the mental element for the crime.

These cases confirm the statement in *Winship* that it had been assumed that the reasonable doubt doctrine was a constitutional standard. They were, however, the earliest cases to translate that assumption into a rule supervising the burden of proof instructions in a state criminal case,[13] and they involved only the burden of proof on the elements of the offense, not an affirmative defense.

Mullaney was a substantial extension, *Mullaney* v. *Wilbur*, 421 U.S. at 697, of *Winship*. The extension consisted of imposing the burden on the prosecution of proving beyond a resaonable doubt, not only the elements of the offense, but also the absence of certain matters of excuse or attenuation. As to this extension, after *Leland* v. *Oregon*, no lawyer, no court, and no commentator ventured the constitutional argument before *Winship*. See Brief for the United States 10-12, 1a-10a.[14] In

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[13] Indeed, *Stump* arose on habeas corpus after Stump had only five years earlier been unsuccessful in trying to assert the same issue on his direct appeal. See *Stump* v. *Bennett*, 398 F.2d at 113. This Court denied certiorari on that direct review. *Stump* v. *Iowa*, 375 U.S. 853 (1963).

[14] The Solicitor General canvassed the pre-*Winship* state and federal decisions in search of cases in which counsel raised the *con-*

1971, the court in *State* v. *Wilbur*, 278 A.2d 139 (Me. 1971), said: "We take judicial notice of the fact that historically a charge substantially in this form has been frequently given in the trial of murder cases but has not heretofore been challenged." *Id.* at 144.

(ii) The North Carolina law that denied Ross due process at his trial was based precisely on that distinction. It required the defendant to establish an "affirmative defense," *State* v. *Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State* v. *Absher*, 226 N.C. 656, 40 S.E.2d 26, 29 (1946), consisting of "matters of excuse or extenuation," *State* v. *Willis*, 63 N.C. 26, 29 (1868), to the satisfaction of the jury. See *State* v. *Hankerson*, 220 S.E.2d at 585. *Mullaney* shattered the certainty of that distinction, *cf.*, *Engle* v. *Isaac*, 456 U.S. at 122; *Patterson* v. *New York*, 432 U.S. at 202, 205-207, 210, but the distinction dominated North Carolina homicide jurisprudence until that decision.

The North Carolina law imposing on the defendant the burden of proof on self-defense and lack of malice enjoyed an established status for 105 years at the time it was applied in

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stitutional issue with regard to the burden of proof on malice or self-defense, but found none. He did locate five such federal decisions describing the burden of proof in general constitutional terms, but none in which the issues in this case were raised. Brief for the United States 10a. The Solicitor General also found three pre-*Leland* v. *Oregon* state cases that discussed the burden of proof issue as an important one but concededly not as a constitutional one. Brief for the United States 10-11, 11 n.8. Interestingly, those cases required the prosecution to prove a defendant's sanity, which this Court has held is not constitutionally required even after *Winship*, *Rivera* v. *Delaware*, 429 U.S. 877 (1976); *Patterson* v. *New York*, 432 U.S. 197, 205 (1977), and self-defense, which this Court so far has characterized as only "a plausible constitutional claim." *Engle* v. *Isaac*, 456 U.S. at 122. The only other discovery that the Solicitor General presented was that as of 1969 19 states did place the burden of proof on the prosecution on the issue of malice and 23 did so on the issue of self-defense. Brief for the United States, 10, 1a-9a.

Ross' trial. Enunciated in 1864, it was not even challenged until after *Winship*, and was not changed until after *Mullaney*. *State* v. *Hankerson*, 220 S.E.2d at 586. Indeed, the North Carolina Supreme Court routinely reiterated it after the *Stump* and *Nales* decisions, shortly after Ross' trial, *State* v. *Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969), and again shortly after it decided Ross' appeal. *State* v. *Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970). Fourteen months after *Winship* was decided, the North Carolina Supreme Court continued to uphold convictions obtained with the unconstitutional instructions without any reference to *Winship* or constitutional questions. *State* v. *Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398 (1971); *State* v. *Winford*, 279 N.C. 58, 181 S.E.2d 423, 427-428 (1971); see *State* v. *Hankerson*, 220 S.E.2d at 586. Other state courts did the same, *e.g.*, *Bosnick* v. *State*, 248 Ark. 1289, 455 S.W.2d 688, 690 (1970); *Wheeler* v. *Comm.*, 472 S.W.2d 254, 256 (Ky. 1971); *State* v. *Jarvi*, 3 Or. App. 391, 474 P.2d 363, 365 (1970); *Comm.* v. *Commander*, 436 Pa. 532, 260 A.2d 673, 778 (1970); *Escamilla* v. *State*, 464 S.W.2d 840, 841 (Tex. Crim. App. 1971).

It was not until five years after Ross' appeal that the issue began to surface in the North Carolina courts, and even then it was rejected. The first case to raise the issue in North Carolina was *State* v. *Sparks*, 285 N.C. 631, 207 S.E.2d 712 (1974). The North Carolina Supreme Court gave the argument only cursory treatment, holding that *Winship* is not "pertinent to the facts in this case." 207 S.E.2d at 719. It then concluded: "We have carefully considered defendant's argument that we should change our well-established rule. However, we are not persuaded to do so." *Id.*

Two other cases raised the issue in North Carolina before *Mullaney*. In *State* v. *Wetmore*, 287 N.C. 344, 215 S.E.2d 51, 56 (1975), the North Carolina Supreme Court ruled: "We did reject this argument in *Sparks*, and we adhere to that decision." 215 S.E.2d at 56. In *State* v. *Harris*, 23 N.C. App. 77, 208 S.E.2d 266 (1974), the North Carolina Court of Appeals said simply: "We also reject it." *Id.* at 268.

(iii) Plainly, North Carolina did not recognize the implications of *Winship* until *Mullaney* decided them. There was no sense of any constitutional challenge to its century-old law among defense attorneys until some time after *Winship*, and not in the courts until after *Mullaney*. That was true of other states as well. *E.g.*, *Henderson* v. *State*, 234 Ga. 827, 218 S.E.2d 612, 617 (1975); *State* v. *Evans*, 278 Md. 197, 362 A.2d 629, 634 (1976).

When *Mullaney* was decided, the North Carolina Supreme Court recognized that the seminal decision for its doctrine was *Winship*. *State* v. *Hankerson*, 220 S.E.2d at 583, 590. That Court insisted that it was only the decision in *Mullaney* that prohibited "the use of our long-standing rules in homicide cases that a defendant" has the burden of proof on the issues of lack of malice and self-defense. *Id.* at 584. The standard instructions to the jury, the Court held, "violate the concept of due process announced for the first time in *Mullaney*," *id.*, which it characterized as a "new rule." *Id.* at 590.

The North Carolina Attorney General, in his brief on behalf of the State filed in this Court in *Hankerson* v. *North Carolina*, also took the position that: "Until the decision in *Mullaney*, there was absolutely no hint from this Court in its prior decisions that the states were not free to place some burden of proof as to affirmative defenses on a defendant in a criminal trial. . . . *In re Winship*, did not purport to deal with affirmative defenses." *Hankerson* v. *North Carolina*, Brief of respondent North Carolina 10. The State elaborated as follows:

> "The case was argued orally in the North Carolina Court of Appeals on May 29, 1975. (A.1) At this point in time no one involved in the case could have known that about two weeks later, on June 9, 1975, *Mullaney* v. *Wilbur* would be announced *establishing a new constitutional due process standard* applicable to the states concerning the placement burden (sic) of proof as to affirmative defenses in homicide prosecutions. *At the time the case was tried, appealed, briefed and argued in the first appellate court level, no error in applying the State allocation of the burden of proof existed which couldd have been made the*

> *basis of an exception and assigned as error.* So also, there was no federal constitutional doctrine applicable to the states which would have required the trial judge to allocate the burden of proof differently than was actually done in his instructions. Because of the lack of any overriding federal constittional standard, the trial judge correctly applied the long-standing North Carolina rules and the *Petitioner quite properly took no exception thereto.*"

Hankerson v. *North Carolina*, Brief of Respondent North Carolina 13 (emphasis added). The State had also expressed this position in its brief opposing the petition for certiorari as follows:

> "(I)t should be noted there was no 'foreshadowing' of the *Mullaney* doctrine in any prior decisions so as to weaken the reliance [of the North Carolina courts] on past rules. As noted previously *In re Winship*, *supra* and *Ivan V.* v. *City of New York*, *supra*, merely applied the long-standing rules of proof of guilt beyond a reasonable doubt to juvenile proceedings where a finding of delinquency was based on proof of a crime. . . . (U)ntil late 1974, never had any Federal court decision 'foreshadowed' this *new doctrine.*"

Hankerson v. *North Carolina*, *supra*, Brief of North Carolina in Opposition to Petition for Writ of Certiorari 26-27 (emphasis added); see also, *id.* at 13.[15]

After this Court's decision in *Hankerson*, the State modified its position. In *Cole* v. *Stevenson*, 620 F.2d 1055 (4th Cir. 1980), the State argued as follows:

> "The fact that *Mullaney* v. *Wilbur*, *supra*, had not been decided in 1971 when petitioner appealed is not significant in this case. *Mullaney* was an application of a 1970 case, *In re Winship*, 397 U.S. 358, a case preceding the instant one; and contentions of the sort made in this case were made in North Carolina prior to *Mullaney* being handed down in

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[15] The Solicitor General, in his statement of the "Question Presented" and his "Statement," also takes the position that Ross' constitutional claim is "based on *Mullaney* v. *Wilbur*". Brief for United States (1), 3.

> the spring of 1975, *State* v. *Sparks* . . .; *State* v. *Harris* . . . ."

Cole v. *Stevenson*, Brief of North Carolina 21-22.

Thus, the courts and the Attorney General of North Carolina have agreed that: (i) the furthest the *Mullaney* doctrine can be traced is to *Winship;* (ii) before *Winship* there was no constitutional basis for challenging the burden of proof instructions on malice and self-defense; and (iii) it was proper or excusable for defendants at that time not do so. "[T]he entire legal system viewed the procedures used to convict as constitutionally proper" at the time of Ross' conviction, to use a test suggested by the Solicitor General. Brief for the United States 7.[16]

That position conforms with this Court's understanding expressed in dictum in *Engle*, 456 U.S. at 131. The Court of

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[16] The Solicitor General argues that a new retroactive decision will "almost always" have been " 'perceived and litigated' " by the time of "the earliest conviction still subject to collateral attack." Brief for the United States 24. The discussion in the text demonstrates that *Mullaney* is a retroactive decision that did not become reasonably available as a constitutional matter until at least *Winship* provided the tools for it, and had not earlier been "perceived and litigated."

In support of his position, the Solicitor General contends that the reason for retroactivity of decisions that relate to the truth-finding function of a trial "is that those precedents were not 'newly minted' . . . ., but anticipated far in advance of this Court's decisions." Brief for the United States 20. In *Hankerson*, however, this Court expressly applied *Mullaney* retroactively only because unconstitutional instructions on the burden of proof substantially impair the truth-finding process, and therefore disregarded North Carolina's argument that *Mullaney* could not have been anticipated in advance. 432 U.S. at 242-243. Thus, *Mullaney* applies to cases that had completed the appellate process by the time of the decision and were raising the issue on habeas corpus. *Cf.*, *United States* v. *Johnson*, 457 U.S. 537, 562 (1982) (holding that a new interpretation of "the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.").

Appeals, therefore, correctly held that this case qualifies as "cause" for a failure to raise an issue before the announcement of a change in the law. Although *Winship* and *Mullaney* did not overrule any precedent, including *Leland* v. *Oregon*, *cf. Rivera* v. *Delaware*, 429 U.S. 877 (1976), they did disapprove a practice that *Leland* v. *Oregon* had been thought to sanction. *Winship* and *Mullaney* overturned a longstanding and widespread practice which a unanimous body of lower court authorty had approved as a constitutional matter. Because, as the State conceded in *Hankerson* and *Cole*, this result was not clearly foreshadowed before *Winship*, and because other defense counsel had not yet perceived and litigated the issue, *Winship* and *Mullaney* may fairly be characterized as a change in the law that Ross is excused for not foreseeing in 1969.

D. The Policies Supporting A Forfeigure For Failing To Comply With A Contemporaneous Objection Rule At Trial Do Not Apply To Ross' Failure To Raise An Issue On Appeal.

In *Fay* v. *Noia*, 372 U.S. 391 (1963), the petitioner sought federal habeas corpus review of a claim that his state court conviction had resulted from the use of a coerced confession at his trial. He had not appealed his conviction, however, and the state courts refused on that account to review his conviction on *coram nobis*. This Court held that his failure to appeal—as long as it was not a deliberate by-pass of state remedies—was not a bar to federal post-conviction review. The Court applied the same rule to federal cases in *Kaufman* v. *United States*, 394 U.S. 217, 220 n.3 (1969).

In *Davis* v. *United States*, 411 U.S. 233 (1973), the Court began to question whether that doctrine should apply to trial-level defaults. *Davis* involved a failure to comply with Rule 12(b)(2) requiring that a challenge to the grand jury composition be made by motion before trial. Distinguishing that situation from a failure to assert a claim on appeal, *id.* at 240, the Court enforced the procedural bar on habeas corpus because compliance with the rule would have permitted timely cure of

the error. *Id.* at 241. The Court noted also that finding a forfeiture on the basis of noncompliance with the rule prevents "sandbagging." In *Francis* v. *Henderson*, 425 U.S. 536, 540 (1976), the Court recognized that a similar state rule had the same value for timely prevention of error.

In *Mullaney* v. *Wilbur*, Justice Rehnquist, joined by Chief Justice Burger, observed in a concurring opinion that "failure to object to a proposed instruction should stand on a different footing" than a failure to appeal. 421 U.S. at 74 n.*. He explained: "It is one thing to fail to utilize the appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forgo making an objection or exception which might prevent the error from ever occurring." *Id.* The next Term Chief Justice Burger wrote an opinion for the Court in *Estelle* v. *Williams*, 425 U.S. 501 (1976), holding that trying a defendent in prison garb did not violate due process if the defendant did not object. In a concurring opinion, Justice Powell pointed out that a timely objection would have allowed the trial judge to correct the situation. *Id.* at 514. Emphasizing that the case involved a "curable trial defect," *id.* at 515, he observed: "The right involved here is a trial-type right. As a consequence, an attorney's conduct may bind the client." *Id.* at 515 n.4. Then in *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), Chief Justice Burger, in a separate opinion, again argued that *Fay* involved "*post*-trial omissions of a technical nature which would be unlikely to jeopardize substantial state interests. *Mid* trial omissions such as occurred in this case, on the other hand, are substantially different." *Id.* at 158. Accordingly the Chief Justice urged: "The 'deliberate bypass' doctrine of *Fay* v. *Noia*, *supra*, should not be extended to midtrial procedural omissions which impair substantial state interests." *Id.*

The Court adopted that position in *Wainright* v. *Sykes*, 433 U.S. 72, 87 (1977), to deal with a failure to object at trial to the admissibility of a confession. Distinguishing a failure to appeal,

id. at 88, the Court explained that a contemporaneous objection rule at trial serves important interests:[17]

(1) Finality: "A contemporaneous objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation." 433 U.S. at 88; see also, *Francis* v. *Henderson*, 425 U.S. 536, 540 (1976). Justice Rehnquist, the author of *Wainright* v. *Sykes*, had explained in his separate opinion in *Mullaney* that this paramount consideration does not apply to a failure to utilize the appeal process. By the time of appeal, it is too late to cure a fundamental constitutional error except by a new trial, so a requirement that the issue be raised on appeal cannot prevent the necessity of a retrial.

Beyond "the problems of finality and federal-state comity [that] arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation," *Jackson* v. *Virginia*, *supra*, 433 U.S. at 322, the interest in finality is therefore not a factor in connection with the enforcement of a state rule requiring issues to be raised on appeal. Such a rule has no relationship to the prevention of trial error. Finality is not advanced by directing defendants to the

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[17] "(A) litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights."

Henry v. *Mississippi*, 379 U.S. 443, 447-448 (1965); see also Hart, "Foreward: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 116-118 (1959). In *Francis* v. *Henderson*, 425 U.S. 536, 540-541 (1976), and *Davis* v. *United States*, 411 U.S. 233, 241 (1973), the Court reviewed the policies underlying the procedural rules involved there and pronounced them "significant," "important and legitimate," *Francis* v. *Henderson*, 425 U.S. at 540, 541, before allowing them to operate as a bar to federal habeas corpus review. See also, *Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978); *Henderson* v. *Kibbe*, 431 U.S. 145, 158 (1977) (Burger, C.J., concurring).

state appellate process; their compliance with that procedure would not end their cases but would rather keep them active for federal habeas corpus review. Denying such review for failure to appeal would finalize the case, but only by an arbitrary procedural trap unless the rule serves some other purpose. "The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured." *Id.* at 323.

(2) Accuracy of record. "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest . . . ." 433 U.S. at 88. An appeal is already too late to achieve that purpose. It does not afford an opportunity to make a record with witnesses. If an evidentiary hearing is necessary to establish the issue, some form of post-conviction proceeding will be required.

(3) Enabling the prosecution to consider conceding the issue in order to protect against reversal in the event of a conviction. 433 U.S. at 89. This purpose, too, may be served only at trial.

(4) Discouraging "sandbagging." 433 U.S. at 89. The concern about sandbagging, even at trial, may be overstated.[18] In

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[18] See Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 158 (1970); Hill, "The Forfeiture of Constitutional Rights in Criminal Cases," 78 Col. L. Rev. 1050, 1061 (1978); Reitz, "Federal Habeas Corpus: Impact of an Abortive State Proceeding," 74 Harv. L. Rev. 1315, 1351 (1961); Rosenberg, "Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel," 62 Minn. L. Rev. 341, 408, 415 (1978); Spritzer, "Criminal Waiver, Procedural Default and the Burger Court," 126 U. Pa. L. Rev. 473, 507 (1978); Tague, "Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do," 31 Stan. L. Rev. 1, 42-46 (1978); Comment, 130 U. Pa. L. Rev. 981, 993-994 (1982).

any event, by the time of appeal, any such concern has dissipated.[19] Certainly if the issue was preserved at trial, there can be no tactical advantage to withholding it from appeal if it is judged to have any merit. *Cf.*, *Jones* v. *Barnes*, 103 S.Ct. 3308 (1983). If the issue requires a factual hearing, again, it would for that reason not be appropriate for appeal.[20]

(5) Advancing the perception of the criminal trial "as a decisive and portentous event." 433 U.S. at 90. In *Engle*, the Court again expressed concern that federal habeas corpus not undermine "the prominence of the trial itself." 456 U.S. at 127. By definition, that event is concluded when appellate procedures are involved. Nevertheless, a comity purpose may be served by the federal court treating respectfully state appellate procedural requirements.

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[19] In *Ford* v. *Strickland*, 696 F.2d 804 (11th Cir. 1983) (*en banc*), the court said that applying *Sykes* to appeal failures would discourage "defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus." *Id.* at 816. There is no reason for any attorney to pass up the state appellate courts in favor of the federal habeas corpus court when he can present the constitutional issue to both successively. The court made no effort to explain why an attorney would not pursue each avenue of relief for the defendant in every case.

[20] In *United States ex rel. Spurlark* v. *Wolff*, 699 F.2d 354 (7th Cir. 1983) (*en banc*), the Court strained to contrive a hypothetical situation presenting a tactical reason for not presenting a claim on appeal:

> "In *Sumner* v. *Mata*, 449 U.S. 539 (1981), the Court held that factual determinations made by a state appellate court are entitled to a presumption of correctness. In a claim such as ineffective assistance of counsel a state prisoner may believe that it is in his best interest not to present the issue to the state appellate court, which will make a factual determination shortly after the trial that will be entitled to a presumption of correctness, but rather to wait until memories have faded to present his claims to a federal court on a habeas petition."

Id. at 361; see Brief for Pet. 15 n.3. Of course:

(A) *Sumner* v. *Mata* involved appellate findings based on the trial record. 449 U.S. at 543. If the defendant is afraid of losing because of

Invoking one additional policy, the State contends that Ross' failure to raise the *Mullaney* issue on appeal denied the State an earlier opportunity to retry him.[21] See *Engle* v. *Isaac*, 456 U.S. at 127-128; Preliminary Draft of Proposed Amendments to Rule 9(a) of the Rule Governing Section 2254 and Section 2255 Proceedings (August 1983). The problem of delay in a retrial is inherent in retroactivity. See *United States* v. *Johnson*, 457 U.S. 537, 543 (1982). The State's concern is inapposite, however, with regard to cases in which a Supreme Court decision after the conclusion of the appeal effects a change in the law from that which the state appellate courts had been applying.[22] The argument contemplates that if Ross

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a new factual determination on appeal, he must have either (a) prevailed on the factual issue at trial, in which case it would be up to the prosecution to appeal, not the defendant, or (b) not raised the issue at trial, in which case the trial default may be the focus of the forfeiture claim.

(B) If the facts are already part of the trial record, delay in pursuing the issue will have no effect on the testimony already presented.

(C) If the facts regarding an ineffective assistance of counsel claim are not part of the trial record, they must be presented on collateral attack rather than appeal.

(D) The laches provision of Rule 9(a) of the Federal Rule of Habeas Corpus is directed against this kind of problem. A procedural forfeiture is not necessary to enable the federal habeas corpus court to deal with it equitably.

(E) Such conniving seems unrealistic, both because its success would be on a high order of speculation and because the defendant would be serving his sentence while awaiting the fading of memories.

[21] During the delay, of course, Ross, like any defendant, was serving his sentence. Thus, he would have preferred to have the *Mullaney* principle available earlier.

[22] If the State is correct that the due process principle was apparent at the time of Ross' trial and appeal, the State could have obviated the need for a retrial by providing him a constitutionally reliable trial at that time. The delay in retrial since *Winship* is attributable to the State's failure to recognize the implications of that decision and the

had raised the *Mullaney* issue on appeal the State Supreme Court would have recognized its force and promptly reversed his conviction. Considering that *Mullaney* was not decided until five years after Ross' appeal, such a result was not likely. Indeed, after Ross' conviction had been affirmed, the North Carolina appellate courts rejected similar arguments made in *Sparks*, *Wetmore* and *Harris*. Even after *Mullaney*, the North Carolina Supreme Court would not have given Ross the benefit of that decision because it held, in *State* v. *Hankerson*, that *Mullaney* did not apply retroactively. Moreover, what could Ross have argued had he raised the issue on appeal? He could have made only a general reference to due process. He could not have cited either *Winship* or *Mullaney* because they did not yet exist. In arguing that Ross forfeited the issue by not raising it in this way, the State is insisting on a formality. The North Carolina Supreme Court would have dismissed the argument, and Ross would not have been able to get serious consideration of it in the North Carolina courts any sooner than the time that he filed his post-conviction application.

Thus, as Chief Justice Burger and Justices Powell and Rehnquist have observed, the interests supporting procedural default on appeal are considerably less forceful than the interests supporting procedural default at trial. See *Fay* v. *Noia*, 372 U.S. at 433. Although the circuits are divided on whether *Sykes* applies to the appeal stage,[23] they agree with that point.

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delay since *Mullaney* is a result of the State's resistance to giving Ross the benefit of that decision. The six year delay since Ross filed his post-conviction petition has occurred because the State values its interest in litigating the issues in this case more highly than it does its interest in an early retrial.

[23] Although recognizing that this Court has expressly not overruled *Fay* on its precise holding, *Wainwright* v. *Sykes*, 433 U.S. at 87-88; see also, *Jones* v. *Barnes*, 103 S.Ct. 3308, 3314 n.7 (1983), the Second, Fourth, Fifth, Seventh and Eleventh Circuits have applied *Wainwright* to defaults on appeal. *Forman* v. *Smith*, 633 F.2d 634, 640 (2d Cir. 1980), *cert. den.*, 450 U.S. 1001 (1981); *Cole* v. *Stevenson*,

Holcomb v. *Murphy*, 701 F.2d 1307, 1311 (10th Cir.), *cert. den.*, 103 S.Ct. 3546 (1983); *United States ex rel. Spurlark* v. *Wolff*, 699 F.2d 354, 358-359 (7th Cir. 1983) *(en banc)*; *Ford* v. *Strickland*, 696 F.2d 804, 816 (11th Cir. 1983) *(en banc)*; *Norris* v. *United States*, 687 F.2d 899, 904 (7th Cir. 1982); *Forman* v. *Smith*, 633 F.2d 634, 639-640 (2d Cir. 1980), *cert. den.*, 450 U.S. 1001 (1981). In *Wainwright*, Chief Justice Burger, concurring, wrote: "I would leave the core holding of *Fay* where it began. . . ." 433 U.S. at 94. He explained that *Fay*, involving a failure to appeal, "was never designed for, and is inapplicable to, errors—even of constitutional dimension—alleged to have been committed during trial." 433 U.S. at 92.[24]

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620 F.2d 1055, 1059 (4th Cir.) *(en banc)*, *cert. den.*, 449 U.S. 1004 (1980); *Evans* v. *Maggio*, 557 F.2d 430, 433 (5th Cir. 1977); *United States ex rel Spurlark* v. *Wolff*, 699 F.2d 354, 361 (7th Cir. 1983) *(en banc)*; see also, *Norris* v. *United States*, 687 F.2d 899, 903-904 (7th Cir. 1982); *Ford* v. *Strickland*, 696 F.2d 804, 816 (11th Cir. 1983) *(en banc)*. The Third, Sixth, and Tenth Circuits, on the other hand, have continued to apply *Fay*. *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 442 (3d Cir. 1982) *(dictum)*; *Crick* v. *Smith*, 650 F.2d 860, 867 (6th Cir. 1981); *Holcomb* v. *Murphy*, 701 F.2d 1307, 1310-1312 (10th Cir.), *cert. den.*, 103 S.Ct. 3546 (1983).

[24] In *Engle*, the Court emphasized that the procedural failure occurred at trial:

> "In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a *trial* default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the *trial court* has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the *trial's significance* by neglecting to raise a claim in *that forum*."

456 U.S. at 128-129 (emphasis added); see also, *id.* at 127 ("safeguards during the trial itself"). The Court mentioned one other consideration: "The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." 456 U.S. at 129. That consideration was mentioned only in conjunction with those arising out of the *trial* failure.

E. North Carolina Law Does Not Require A Forfeiture For Every Procedural Default.

North Carolina law provides flexibility in the determination whether to impose a forfeiture for a procedural default. The Motion for Appropriate Relief procedure, North Carolina General Statutes section 15A-1419(a), provides the following grounds for denial, with relevant exceptions:

> "(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, *unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.*
>
> "(3) Upon a previous appeal *the defendant was in a position to adequately raise the ground or issue* underlying the present motion but did not do so." (Emphasis added)

In addition, section 15A-1419(b) provides:

> "Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious."

See *State* v. *Afflerback*, 46 N.C. App. 344, 264 S.E.2d 784, 785 (1980) (The defendant failed to give notice at the time of his guilty plea that he intended to appeal the denial of his motion to suppress evidence. Nevertheless, the court held that because the requirement to do so was "a recent interpretation of the statute which gives defendant his right to appeal and which was handed down just before this appeal was docketed, we will . . . discuss defendant's claim on the merits."); see also, *State* v. *White*, 274 N.C. 220, 162 S.E.2d 473, 479 (1968) ("provided factors beyond his control prevented him from claiming them earlier").

F. Under All The Circumstances Ross Has Met The "Cause" Standard.

In concluding that Ross met the "cause" requirement the Court of Appeals emphasized the following factors: (A) The challenged instructions had been used in North Carolina and other states for over a century and had been frequently approved by the state courts. 704 F.2d at 708. (B) "The default here occurred in the appellate process," not at trial. 704 F.2d at 708; see also, *Huffman* v. *Wainwright*, 651 F.2d 347, 352 (5th Cir. 1981). (C) "[N]o one can say that the verdict was not reached because the jurors placed the burden of persuasion upon the defendant rather than upon the state, just as they were instructed.[25] Because the burdens of persuasion of his two defenses were placed upon him, Ross did not receive a fair trial. Such major unfairness in a trial is itself a miscarriage of justice." 704 F.2d at 709. (D) Ross' appeal was concluded before *Winship* provided the "springboard from which to launch a constitutionally based objection to the charge." 704 F.2d at 708. (E) Therefore, Ross "had no reasonable basis for asserting the constutitional claim on appeal." 704 F.2d at 709.

The Ninth Circuit has followed the same approach. In *Myers* v. *Washington*, 646 F.2d 355 (9th Cir. 1981), *remanded for reconsideration in light of Engle*, 456 U.S. 921 (1982), *on remand*, 702 F.2d 766 (9th Cir. 1983), the Court found "cause" for failing to raise the *Mullaney* issue on an appeal that was completed before *Winship*. 702 F.2d at 768. The Court held that none of the considerations in *Sykes* "has any force in dealing with a situation like the appellant's, where the alleged procedural default consists of failure to raise on appeal constitutional issues that were unknown at the time the appeal was taken." 646 F.2d at 359. Similarly, in *Gibson* v. *Spalding*, 665 F.2d 863 (9th Cir. 1981), *vacated for reconsideration in light of Engle*, 456 U.S. 968 (1982), *on remand*, 703 F.2d 362 (9th Cir. 1983), a different panel of that court held that the

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[25] *Cf.*, *Connecticut* v. *Johnson*, 103 S. Ct. 969, 977 (1983).

Sykes interests were not "implicated in a situation where the procedural default consists of a failure to raise on appeal a constitutional issue that was impossible for the defendant to recognize at the time the appeal was taken." 665 F.2d at 866-866; *but see, Matias* v. *Oshiro*, 683 F.2d 318, 321 n.3 (9th Cir. 1982).

This Court followed a similar approach in *Gardner* v. *Florida*, 430 U.S. 349 (1977). In that case, the defendant did not request access to the report that the sentencing judge used in deciding to impose the death penalty despite a jury recommendation for life. The Court employed five reasons for deciding against forfeiture. (A) The issue went to the important death penalty determining process. (B) Counsel's failure could not have been a tactical decision. (C) The state supreme court has held that it reviews the entire record in capital appeals. (D) Two members of that court discussed the issue, suggesting that the entire court considered it. (E) The State did not urge forfeiture.

Fay v. *Noia* itself was a case in this pattern. Although the Court explained its result in terms of the "deliberate bypass" test, Noia did make a deliberate decision not to appeal. He testified that he did not want to burden his family with the costs. His attorney testified that Noia passed up the appeal because he was afraid that, if successful, he might get the death penalty on retrial. See 372 U.S. at 397 n.3; see also, *id.* at 471 (Harlan, J., dissenting). The instincts of the Court to grant relief to Noia are validated by the cause-and-prejudice standard: (A) The issue that Noia sought to raise was one that affected the integrity of the fact-finding process: that the principal evidence against him was a brutually involuntary confession. 372 U.S. at 395 n.1. (B) The failure occurred on appeal, and not at trial. 372 U.S. at 433. (C) The failure occurred in 1942, and this Court later issued decisions that would have protected Noia against both of the concerns that motivated his decision. In *Douglas* v. *California*, 372 U.S. 353 (1963), the Court held that an indigent defendant has a right to counsel on appeal. That decision came at the same time as *Fay* v. *Noia*,

suggesting that the Court was then sensitive to the inequity that Noia suffered as a result of the absence of that right in 1942. Later, in *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969), the Court held that due process prohibits the imposition of a more severe sentence upon a defendant after a new trial unless based on new wrongful conduct by the defendant. Thus, there was "cause" for Noia's failure to appeal because he and his attorney could not anticipate *Douglas* 21 years later and *Pearce* 27 years later.

This case involves the constitutional invalidity of a state policy with a long tradition that was shared with many other states. It is not a challenge to an isolated incident. The entire institutional structure of the state judicial system failed to notice the unconstitutionality of its practice despite its frequent and general application before and even after *Winship*. Although the State's courts, judges, and prosecutors had at least equal responsibility with its defense attorneys for assuring the conformity of their law with the Constitution, they failed to recognize the violation. See *Gardner* v. *Florida*, 430 U.S. at 361 n.12 ("The Supreme Court of Florida decided petitioner's case before our decision in *Proffitt* v. *Florida* . . . . Therefore, we cannot join Mr. Justice Marshall's criticism of the Florida courts for their failure to follow the teaching of those cases.") see also, *Murch* v. *Mottram*, 409 U.S. 41, 45-47 (1972) (finding deliberate by-pass where the state court advised defendant of the consequences of withdrawing a claim from a post-conviction petition).[26] The constitutional violation

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[26] Several commentators have suggested that the state should have responsibility at least for giving a defendant "notice" before his default can amount to a federal forfeiture. Gibbons, "Waiver: The Quest for Functional Limitations on Habeas Corpus Jurisdiction," 2 Seton Hall L. Rev. 291, 308-309 (1971); Rosenberg, "Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel," 62 Minn. L. Rev. 341, 413 (1978); Spritzer, "Criminal Waiver, Procedural Default and the Burger Court," 126 U. Pa. L. Rev. 473, 513 (1978).

is clear, even conceded, on the record of the trial. There is no need for an evidentiary hearing to adjudicate any dispute. *Cf.*, *Bowen* v. *Johnston*, 306 U.S. 19, 26-27 (1939). To deny Ross the benefit of *Mullaney*, relieving him from a conviction that is conceded to be constitutionally unfair and unreliable, because of his excusable failure to claim it on appeal before it was decided, and even before *Winship* laid the groundwork for it, would exalt over justice a procedural rule that has no justification on the facts of this case.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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Court-appointed
Counsel for Respondent

EXHIBIT A

SPECTRUM OF PROCEDURAL FAILURES BY THE DEFENSE IN A STATE CRIMINAL CASE

Ineffective assistance of counsel	Serious neglect by counsel	Inadvertence, negligence, or lack of due diligence by counsel		Judgment decision of counsel		Retroactive change in the law previously unavailable to counsel with reasonable diligence
		(a) Developing change in the law being raised in the courts and in the literature, with the foundation doctrine already developed	(b) No explanation	(a) No explanation	(b) Tactical or strategy decision	Important new evidence previously unavailable to counsel with reasonable diligence
		Engle v. *Isaac*		*Davis v. United States* (1973) *Francis v. Henderson* *Wainright v. Sykes*	*Estelle v. Williams* *Henry v. Mississippi*	Reform of Federal Intervention in State Proceedings Act, S. 1763, 98th Cong., passed Senate on February 6, 1984 *O'Connor v. Ohio* *Smith v. Yeager* *Davis v. United States* (1974) *Reece v. Georgia* *Carter v. Texas* *Johnson v. Bennett*
			Not "cause"			"Cause"

EXHIBIT B

MULLANEY V. WILBUR TIME LINE

1952	March 1969	Oct. 1969	1970	Beginning in 1970	1971	1972	1973 and 1974	Oct. 1974	1974
Leland v. Oregon	Ross' trial	Ross' appeal	* * * IN RE WINSHIP * * *	Law review articles	State v. Wilbur	District court	Mullaney v. Wilbur Court of Appeals	Certiorari granted	State v. Sparks; Wetmore; Harris

EXHIBIT B
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MULLANEY V. WILBUR TIME LINE

Jan. and April 1975	June 1975	Sept. 1975	1975	1977	1978	1978	1979	1982
	* * *							
Engle, two of the trials	MULLANEY v. WILBUR	Engle, one of the trials	State v. Hankerson	Hankerson v. North Carolina	State v. Hancock	Ross' post-conviction petition	Wynn v. Mahoney	State v. Bush
	* * *							